ORIGINAL 95-1717 (15)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

No.

UNITED STATES OF AMERICA, Petitioner,

v.

DAVID W. LANIER, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

Alfred H. Knight
WILLIS & KNIGHT
215 Second Avenue, North
Nashville, TN 37201
(615) 259-9600

Attorneys for the Respondent

15 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES - Continued

Statutes

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

No.

UNITED STATES OF AMERICA, Petitioner,

v.

DAVID W. LANIER, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

The Defendant/Respondent was convicted of violating the due process rights of five women, while acting "under color of law" as a Tennessee trial level judge. The alleged due process violations consisted of several acts of sexual harassment and assault, ranging from unconsented-to touchings to oral rape. The government contended below, and continues to contend, that these acts -- all punishable as misdemeanors or felonies under Tennessee law -- were constitutional crimes under 18 U.S.C. § 242, because they were committed by a judge, and the jurors found, pursuant to the trial court's instructions, that the acts were "shocking to the conscience".

The Sixth Circuit Court of Appeals, en banc, reversed the convictions, holding that the Defendant's acts did not come within any category of due process violations previously defined

by this Court[1], and that, therefore, applying § 242 to those acts: 1) amounted to an ad hoc judicial creation of a constitutional crime[2]; 2) deprived the Defendant of fair notice that his conduct constituted a constitutional crime, punishable under federal law[3]; 3) amounted to an invalid ex post facto application of a criminal statute[4]; and 4) rendered § 242 fatally vague, thus providing prosecutors with over-broad, potentially dangerous discretion in enforcing it.[5] The Court did not address the Defendant's contention that his conduct had not been committed "under color of law", in that he did not commit it under "the pretense" of exercising his judicial

---

1 The Defendant/Respondent agrees that if extensions of the scope of a criminal statute are to be effected by court decisions, such extensions should be confined to clear, nationally-applicable rulings by the Supreme Court; or perhaps, by a clear consensus of circuit court decisions. He submits, however, that the extension effected in the present case not only lacked Supreme Court precedent, it lacked clear precedent of any kind. Indeed, the basic point of this Response is that the boundaries of the extension itself are unclear.

2 United States v. Wiltberger, 18 U.S., 35, 43, 44 (1820) (Marshall, C.J., "It is the legislature, not the court, which is to define a crime, and ordain its punishment").

3 Lenzetta v. New Jersey, 306 U.S. 451, 453 (1938) ("No one may be required at peril of his life, liberty or property to speculate as to the meaning of penal statutes.")

4 Bouie v. Columbia, 378 U.S. 347, 353, 354 (1964) ("If the legislature is barred by the ex post facto clause from passing . . . a law [which criminalizes an act that was non-criminal when committed], it must follow that a . . . court is barred by the due process clause from achieving precisely the same result by judicial construction").

5 Cox v. Louisiana, 379 U.S. 559, 579 (1965) (Broad, vague criminal statutes do not "provide for government by clearly defined law, but rather for government by the moment-to-moment opinions of a policeman on his beat").

authority. Screws v. United States, 325 U.S. 91, 111 (1945) ("It is clear that under 'color' of law means under 'pretense' of law").[6]

The government contends that the Defendant's conduct had been sufficiently defined as violative of due process, by previous court decisions holding that "physical integrity" is entitled to due process protection under certain circumstances, and by decisions characterizing certain due process violations as "shocking to the conscience". The government in effect contends that the case law's use of such generalized language to describe due process violations in some factual contexts was sufficient notice that any physical assault committed by a state official, found by the jury to be shocking to the conscience, was ipso facto a constitutional crime under § 242. This is contended to be true, notwithstanding that most of the cited precedents were civil § 1983 cases, and none of them involved non-custodial assaults, as did the present case.

The basic defect in the government's position is the absence of any conceptual definition of the Defendant's alleged federal crimes. Even now, the government cannot describe, except in the broadest terms, the characteristics of the Defendant's conduct that supposedly rendered it violative of due process. The actions he was charged with committing were common assaults, with no apparent constitutional implications. They were alleged to have been committed by a man who was a judge, in his chambers during office hours, but they were personal, private

---

6 No contention was even made that the Defendant was purporting or pretending to exercise his judicial authority when he committed these assaults. Previous § 242 prosecutions have been confined to custodial assaults on arrestees or prisoners, for the obvious reason that only custodial officials can administer assaults under the color, or pretense, of exercising their official authority. The "color of law" argument was a clear ground for reversing the Defendant's conviction in this case, but, for whatever reasons, the Court of Appeals confined its analysis to the constitutional issue.

actions, which bore no resemblance to, and had no connection with, the performance of his judicial duties. For the same reason that they cannot be considered to have been committed "under color of law", they did not involve any element of state action which would render them constitutional violations. C.f., Delcambre v. Delcambre, 634 F. 2d 407 (5th Cir. 1981) (A police chief charged with assaulting his sister-in-law in the municipal police station, while on duty, did not violate § 1983 because the assault had no relationship to the performance of his official duties); Murphy v. Chicago Transit Authority, 638 F. Supp. 464 (N. D. Ill. 1986) (Staff attorneys who allegedly harassed and abused a fellow employee during office hours, in the work place, did not violate § 1983 because their actions "bore no similarity to the nature of the powers and duties assigned to the defendants."); Rogers v. Fuller, 410 F. Supp. 187 (M. D. NC 1976) (Police officers who stole $35,000 dollars from the plaintiff's home while conducting a search did not violate § 1983, because they did not "misuse their authority by confiscating the coins without justification," but merely stole them).

Unless the constitution is to be treated as interchangeable with, and redundant of, state criminal laws, such purely private assaults cannot be -- and such assaults have never been -- given the status of due process violations. The application of § 242 urged by the government in this case would render it an occupational criminal statute, applicable to state officials who commit physical assaults, regardless of the factual circumstances in which the assaults are committed. The reasoning that underlies this prosecution would apply as well to the conduct of a judge who beat up a lawyer in a barroom brawl.

The government's attempt to give constitutional status to these assaults by labeling them "violations of physical integrity" which "shocked the conscience" of the jury merely underlines

the vagueness of the constitutional concept. Any assault, of course, violates the "physical integrity" of the victim, and most serious assaults are shocking to someone's conscience. As used in the case law, these phrases do not purport to comprehensively define unconstitutional conduct, they are merely characteristics of specific conduct that has for various reasons been held to be unconstitutional.

Criminal abortion statutes that unduly restrict the right to an abortion, and the use of force to extra-judicially punish a prisoner, for example, are intrusions upon "physical integrity", which amount to due process violations. Planned Parenthood v. Casey, 505 U.S. 833 (1992); Screws v. United States, 325 U.S. 91 (1945). But abortion laws and the use of force on prisoners are not due process violations merely because they "violate physical integrity", and are not invariably due process violations. Screws v. United States, 325 U.S. at 108, 109 ("The fact that a prisoner is assaulted, injured or even murdered by state officials does not necessarily mean that he is deprived of any right protected or secured by the Constitution or laws of the United States"). If all intrusions on "physical integrity" violated due process, all actions of state employees that have an unconsented-to effect on someone's body would be subject to prosecution under § 242. This is precisely what the government's argument suggests, but it is obviously not the case. Screws v. United States, supra, (The Defendant's murder of a prisoner violated due process only to the extent that it was intended to impose "trial by ordeal" in lieu of trial by legal process).

The use of the phrase "shocks the conscience" to "narrow" the definition of the offense is similarly misleading and unhelpful. This phrase was never intended as a comprehensive, free-standing definition of due process violations, and was never intended as a jury standard. It was

first used in Rochin v. California, 342 U.S. 165 (1951) to describe specific, reprehensible police actions held to have violated due process. These were official actions, analogous in their purpose and effect to coercing a confession or conducting an unreasonable search and seizure. They were given the status of constitutional violations because they had that purpose and effect, and because they were extreme enough to "shock the conscience" of the Court:

> This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents -- this course of proceedings by agents of government to obtain evidence is bound to offend even hardened sensibilities. 342 U.S. at 172. (Emphasis added.)

There is no implication in Rochin, or in any other case, that a jury could find a constitutional violation by making a discretionary determination that a common assault "shocked the conscience". Such a jury standard is obviously too vague to serve as a basis for factually distinguishing constitutionally innocent from constitutionally guilty conduct. Compare, Rabeck v. New York, 391 U.S. 462 (1968) (A statute prohibiting the sale of magazines "which would appeal to the lust of persons under 18 years of age" held fatally vague); and Giaccio v. Pennsylvania, 384 U.S. 399 (1966) (A state statute providing that criminal juries "shall determine by their verdict whether . . . the defendant shall pay the costs" held fatally vague).

The present application of § 242 is also unprecedented in its potential scope. Previous applications have been confined to custodial assaults in which the defendants purported to be exercising their official authority to restrain or subdue arrestees or prisoners. The constitutional justification for such applications rests upon procedural, not substantive, due process grounds. Such excessive use of force on persons held in custody constitutes the infliction of corporal punishment -- trial and punishment "by ordeal" -- in lieu of, or in addition to, punishment by

constitutional process. Screws v. United States, 325 U.S. 91, 107 (1945). Even civil assault cases under § 1983 have been confined to custodial assaults by defendants purporting to perform official functions, with the rationale in isolated cases being extended to assaults by non-law enforcement officials, such as schoolteachers physically abusing students in their custody. Doe v. Taylor Independent School District, 15 F. 3d 443 (5th Cir. 1994).

The application of § 242 to this Defendant's conduct obliterates the definitional boundaries of these precedents. Apparently -- although by no means clearly -- it would make any physical assault by a state employee prosecutable under § 242, a conviction being subject only to a jury determination that the assault is shocking to the conscience. Such applications, would, among other things, violate the specific holding in Screws, that something more than physical violence by a state actor is necessary to constitute a violation of § 242, and would make all serious physical abuse and violence subject to federal jurisdiction when a state actor is involved.

Under analogous circumstances, this Court has declined to give such an open-ended definition to the due process clause, even in a civil context. In Paul v. Davis, 424 U.S. 693 (1976), the Plaintiff recovered a damages judgment under § 1983, because a notice posted by the police publicly identified her as a shoplifter, although she had never been prosecuted or convicted. The Court of Appeals affirmed, reasoning that freedom from defamation had, in other contexts, been defined as a due process "liberty interest" -- just as the government reasons in this case that the right to "bodily integrity" has been given due process status in other contexts. The Court further reasoned -- as the government is unable to do in this case -- that the deprivation of this liberty interest had been accomplished by declaring the Defendant guilty

of an offense for which she had never been prosecuted, in violation of her procedural due process rights.

This Court reversed the judgment for the plaintiff, holding that not every infliction of defamation by state action can be regarded as a violation of a constitutional liberty interest, simply because some actions having a defamatory effect have been so regarded. To accept the Court of Appeals' reasoning, the Court concluded, would make of § 1983 a "font of tort law to be superimposed upon whatever systems may already be administered by the states" 424 U.S. at 701. See, also, Baker v. McCollan, 443 U.S. 137 (1979) (Unreasonably detaining the defendant in jail for three days because of mistaken identity was not a violation of his due process "liberty interests" so as to justify a § 1983 claim); Parratt v. Taylor, 451 U.S. 527 (1981) (Loss or theft of a prisoner's property by prison personnel was not a "deprivation of property without due process of law", so as to justify a § 1983 claim).

Similarly, adopting the prosecution's theory in the present case would render § 242 a "font" of criminal law, to be superimposed upon state criminal codes when the Defendant is a public employee or official.[7] Such applications would not only do violence to the due process clause, they would violate acceptable boundaries of state-federal jurisdiction to an unprecedented extent. United States v. Bass, 404 U.S. 336, 349 (1971):

> "[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance. Congress has traditionally been reluctant to define as a federal crime conduct readily denounced by the state . . . [W]e will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction."

[7] Indeed, one of the dissenting judges expressly adopted the applicable state law classifications in determining whether the Defendant's alleged conduct was prosecutable under federal law, concluding that the convictions for conduct which would have constituted felonies under Tennessee law should be affirmed, but those involving Tennessee misdemeanors should be reversed. 73 F. 3d at 1397.

Conclusion

For the foregoing reasons, it is respectfully submitted that the application for a writ of certiorari in this case should be denied.

Respectfully submitted,

WILLIS & KNIGHT

By: _____
Alfred H. Knight, BPR #2968

215 Second Avenue, North
Nashville, TN 37201
(615) 259-9600

Attorneys for Defendant/Respondent

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been sent via United States Mail, postage prepaid, addressed to the following:

Drew S. Days, III
Solicitor General

Deval L. Patrick
Assistant Attorney General

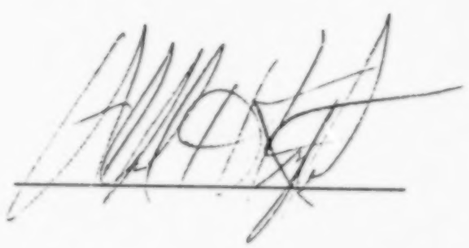
Paul Bender
Deputy Solicitor General

Paul R.Q. Wolfson
Assistant to the Solicitor General

Jessica Dunsay Silver
Thomas E. Chandler
Attorneys

Department of Justice
Washington, DC 20530

On this the 22ND day of May, 1996.



c:\files\lanier\apc.ans

LAW OFFICES
WILLIS & KNIGHT
TWO FIFTEEN SECOND AVENUE, NORTH
NASHVILLE, TENNESSEE 37201

WILLIAM R. WILLIS, JR.
ALFRED H. KNIGHT
MARIAN F. HARRISON
ALAN D. JOHNSON
A. RUSSELL WILLIS
JEFFREY G. RAPPUHN
GREGORY D. SMITH
W. REESE WILLIS, III

TELEPHONE
(615) 259-9600

TELECOPIER
(615) 259-3490

May 22, 1996

Mr. William Suter
U.S. Supreme Court Clerk
U.S. Supreme Court
1 First Street, NE
Washington, DC 20543-0001

RE: United States of America v. David W. Lanier

95-1717

Dear Mr. Suter:

Enclosed for filing are the originals and 10 copies of the respondent's motion to proceed in forma pauperis and response to the United States' petition for writ of certiorari. If there is anything further that you need, please feel free to call.

Sincerely,

WILLIS & KNIGHT

Alan D. Johnson

ADJ:jga

enclosures